92-1322

No. _____

Supreme Court, U.S.
FILED
APR 2 1992
OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1991

JESUS FELIX-GUTIERREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORIARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORIARI

DONALD C. RANDOLPH
Randolph & Levanas
1717 4th Street
Suite 300
Santa Monica, CA 90401
(310)395-7900
Counsel for Petitioner
Jesus Felix-Gutierrez

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX (213) 747-5843

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY

QUESTION PRESENTED

1. CAN THE UNITED STATES GOVERNMENT ASSERT EXTRATERRITORIAL JURISDICTION UNDER 18 U.S.C. SECTION 3 OVER A MEXICAN NATIONAL AS AN ACCESSORY-AFTER-THE-FACT BASED ON HIS CONDUCT IN HELPING ANOTHER MEXICAN NATIONAL FLEE FROM MEXICO TO COSTA RICA TO EVADE PROSECUTION IN MEXICO FOR CRIMES COMMITTED IN MEXICO WHERE NEITHER 18 U.S.C. SECTION 3 NOR ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW EXPLICITLY PROVIDE FOR SUCH JURISDICTION?

TABLE OF CONTENTS

QUESTION PRESENTED	I
TABLE OF CONTENTS	II
LIST OF APPENDICES	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI TO THE FEDERAL COURT OF APPEALS FOR THE NINTH CIRCUIT	1
OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW	4
REASON FOR GRANTING THE PETITION	5
A. UNDER DOMESTIC LAW, EXTRATERRITORIAL JURISDICTION FOR ACCESSORIES-AFTER-THE-FACT CANNOT BE IMPLIED FROM THE EXISTENCE OF JURISDICTION OVER PRINCIPALS IN THE SUBSTANTIVE OFFENSE	7
B. UNDER INTERNATIONAL LAW, EXTRATERRITORIAL JURISDICTION OVER ACCESSORIES-AFTER-THE-FACT IS PATENTLY UNREASONABLE	17
CONCLUSION	20

LIST OF APPENDICES

APPENDIX A	1
APPENDIX B	1 - 28
APPENDIX C	1

TABLE OF AUTHORITIES

STATUTES, TREATIES, AND RULES

	Page
18 U.S.C. Section 3	2, 3, 10, 13
18 U.S.C. Section 1651	8, n.1
18 U.S.C. Section 953	8, n.1
28 U.S.C. Section 1254 (1)	2
United States Supreme Court Rule 10.1(c)	5
Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. N9656	16

CASES

Brulay v. United States 383 F.2d 345 (9th Cir.), cert. denied, 389 U.S. 986, 88 S.Ct. 469 (1967)	11
Chua Han Mow v. United States 730 F.2d 1308 (9th Cir. 1984), cert. denied, 470 U.S. 1031, 105 S.Ct. 1403, 84 L.Ed.2d 790 (1985)	10, 17
EEOC v. Arabian American Oil Co. 111 S.Ct. 1227, 113 L.Ed. 2d 274 (1991)	8 n.3

Pinkerton v. United States 13
328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed.
1489 (1946)

United States v. Alcoa 10
148 F.2d 416 (2d Cir. 1945)

United States v. Benitez 11
741 F.2d 1312 (11th Cir. 1984),
cert. denied, 471 U.S. 1137, 105
S.Ct. 2679, 86 L.Ed.2d 698 (1985)

United States v. Bowman 7-10, 14, 15, 17
260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149 (1922)

United States v. Columba-Colella 17
604 F.2d 356 (5th Cir. 1979)

United States v. Cotten 8
471 F.2d 744, cert. denied,
411 U.S. 936, 93 S.Ct. 1913 (1973)

United States v. Felix-Gutierrez 2, 5, 11
940 F.2d 1200 (9th Cir. 1991)

United States v. Layton 8, 11
855 F.2d 1388 (9th Cir. 1988).
cert. denied, 489 U.S. 1046, 109 S.Ct.
1178, 103 L.Ed. 2d 244 (1989)

United States v. Velasquez-Mercado 17

697 F. Supp. 292 (S.D. Tex. 1988),
aff'd, 872 F.2d 632 (5th Cir. 1989),
cert. denied, 110 S.Ct. 187, 107
L.Ed.2d 142 (1989)

United States v. Verdugo-Urquidez 15 n. 4
494 U.S. 1092, 110 S.Ct. 1839, 108
L.Ed.2d 968 (1989)

United States v. Verdugo-Urquidez 16 n. 5
939 F.2d 1341 (9th Cir. 1991)

TREATISES AND OTHER AUTHORITIES

4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Chapter 3, 34-39 12

G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 410 (2d ed. 1961) 12

2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 231 (1883) 12

LA FAVE & SCOTT, CRIMINAL LAW (2d ed. 1986) 6, 12-14

RESTATEMENT (2D) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (revised), Section A402, p.240 (1980) 9

No._____

In The Supreme Court of the United States

October Term, 1991

JESUS FELIX-GUTIERREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE FEDERAL COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jesus Felix-Gutierrez respectfully prays that a Writ of Certiorari issue to review the decision of the Federal Court of Appeals for the Ninth Circuit affirming his conviction as an accessory-after-the-fact under 18 U.S.C. Section 3.

OPINION BELOW

The opinion of the Federal Court of Appeals for the Ninth Circuit in this case, United States v. Felix-Gutierrez, 940 F.2d 1200 (9th Cir. 1991), is reproduced in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

The judgment of the Federal Court of Appeals for the Ninth Circuit was rendered on July 22, 1991, affirming petitioner's conviction for accessory-after-the-fact under 18 U.S.C. Section 3. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was filed with the Ninth Circuit, which was denied by the Ninth Circuit on January 3, 1992. This order is attached as Appendix B.

This Petition for Writ of Certiorari is timely filed under Supreme Court Rules 13.1 and 13.4, which provide that such a petition shall be deemed timely when it is filed with the clerk of this Court within 90 days after the date of the denial of a petition for rehearing by a United States Court of Appeals.

STATUTORY PROVISIONS INVOLVED

Section 3 of Title 18 of the United States Code is set forth in full at Appendix C.

STATEMENT OF THE CASE

This case arises out of the 1985 kidnapping, interrogation and torture, and ultimately the murder, of DEA Special Agent Enrique Camarena and Mr. Alfredo Zavala, who worked for the DEA as a pilot. Petitioner Felix-Gutierrez ("Felix") was not charged with substantive offenses, such as conspiracy or murder charges, related to the actual kidnapping, torture, and murder of a federal agent. Rather, Petitioner Felix was charged only with being an accessory-after-the-fact under 18 U.S.C. Section 3 to Rafael Caro-Quintero, who, it was alleged, participated in the kidnapping and murder. Two days after DEA Agent Camarena's disappearance, Caro-Quintero flew from Mexico to Costa Rica following a shootout at a

Mexican airport with Mexican law enforcement officials and DEA agents. Evidence was introduced at trial to show that Felix had some involvement in arranging for the plane which took Caro- Quintero to Costa Rica, that Felix was seen with Caro-Quintero in Costa Rica and had obtained a car for Caro-Quintero's use in Costa Rica, and that Felix was aware of Caro-Quintero's involvement in the Camarena murder.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

In his appeal to the Ninth Circuit, Petitioner Felix argued that the district court lacked subject-matter jurisdiction to try him as an accessory-after-the-fact because no principle of domestic or international law permits the application of extraterritorial jurisdiction over the accessory-after-the-fact statute. The Ninth Circuit panel rejected Felix's contention:

> We have inferred extraterritorial application of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses. We see no reason why a different rule should apply in accessory after the fact cases.

Felix-Gutierrez, supra, 940 F.2d at 1205 (citations omitted).

The Ninth Circuit further found that three international law principles permit application of extraterritorial jurisdiction over Felix's alleged criminal acts as an accessory-after-the- fact: 1) territorial; 2) protective; and 3) passive personality. Felix-Gutierrez, supra, 940 F.2d at 1205.

REASON FOR GRANTING WRIT

I. The Ninth Circuit's Finding of Extraterritorial Jurisdiction over Accessory-After-the-Fact Charges Is a Stark Departure from Every Federal Decision on Extraterritorial Jurisdiction, from Well-Established Principles of International Law, and from the Centuries-Old Tenet in Criminal Jurisprudence Treating Accessories-After- the-Fact Separately From Principals or Conspirators in the Substantive Offense.

This Court may grant certiorari when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with the applicable decisions of this Court. Supreme Court Rule 10.1(c). Both of these grounds are present in the instant case.

The crime of being an accessory-after-the-fact dates back to English common law. LAFAVE & SCOTT, CRIMINAL LAW 598 (2d ed. 1986). Nevertheless, there is not a single reported case by this or any other court prior to the Ninth Circuit panel decision below even addressing the question of extraterritorial jurisdiction over accessory-after-the-fact charges. The accessory-after-the-fact offense is a crime of obstruction of justice and no principle of domestic or international law provides for extraterritorial jurisdiction over what is in effect the obstruction of the justice process of a foreign country. Because the Ninth Circuit decision constitutes a radical extension of extraterritorial jurisdiction, with far-reaching ramifications for any criminal case raising an issue of extraterritorial jurisdiction, petitioner respectfully submits that this Court should exercise its discretion to review this important federal question of first impression.

In finding extraterritorial jurisdiction in this case, the Ninth Circuit panel overlooked the long-standing distinction in criminal jurisprudence between principals and conspirators, all of whom are considered participants in the substantive offense, and accessories-after-the-fact, who have committed the distinct, lesser offense of obstruction of justice. This distinction is crucial for the purposes of jurisdictional analysis. To determine whether

there is extraterritorial jurisdiction over an accessory-after-the-fact, domestic and international law principles require an examination of the interests and harms involved in the alleged obstruction of justice taking place extraterritorially, not in the interests and harms involved in the murder of a U.S. law enforcement agent extraterritorially.

The Ninth Circuit's decision broke with a centuries-old tradition in criminal jurisprudence of treating the gravamen of the accessory-after-the-fact offense as obstructing justice, not as identical with the gravamen of the underlying offense committed by the principals. The jurisdictional analysis employed by the Ninth Circuit constitutes a stark departure from the analysis employed by this Court in United States v. Bowman, 260 U.S. 94, 97-98 (1922), and provides another ground for granting the instant Petition for Writ of Certiorari.

A. UNDER DOMESTIC LAW, EXTRATERRITORIAL JURISDICTION FOR ACCESSORIES-AFTER-THE-FACT CANNOT BE IMPLIED FROM THE EXISTENCE OF JURISDICTION OVER PRINCIPALS IN THE SUBSTANTIVE OFFENSE.

Whether particular conduct is subject to extraterritorial criminal jurisdiction is a question of statutory interpretation: Did congress intend to include

acts occurring outside the United States within the reach of the statute? Bowman, supra, 260 U.S. 94, 97-98, 43 S.Ct. 39 (1922); United States v. Layton, 855 F.2d 1388, 1394 (9th Cir. 1988), cert. denied, 489 U.S. 1046, 109 S.Ct. 1178 (1989). There are several federal statutes which expressly extend extraterritorially.[1] In the absence of an express provision conferring extraterritorial jurisdiction, there is a presumption against extraterritorial application of a penal statute, although federal courts, in limited circumstances, have found extraterritorial effect by implication. United States v. Cotten, 471 F.2d 744, 750, cert. denied, 411 U.S. 936, 93 S.Ct. 1913 (1973).[2]

The seminal case dealing with implied extraterritorial jurisdiction is United States v. Bowman, in which the Supreme Court set forth the operative limitations on implying such jurisdiction where it is not expressly conferred by statute. Under the Bowman Court's analysis, some crimes, by their nature, are not likely to

1 For example, under 18 U.S.C. Section 1651, piracy may be committed "on the high seas." 18 U.S.C. Section 953 prohibits "[a]ny citizen of the United States, wherever he may be," from carrying on intercourse on with a foreign government.

2 The general presumption against extraterritorial jurisdiction was recently reaffirmed by the Supreme Court in EEOC v. Arabian American Oil Co., 111 S.Ct. 1227, 1230 (1991).

occur abroad. For these crimes, jurisdiction logically flows from the locus of the criminal activity. These crimes are generally committed against individuals or their property, such as murder or robbery. Extraterritorial jurisdiction over such crimes is unavailable unless the prohibiting penal statute expressly covers actions taken abroad. Bowman, supra, 260 U.S. at 98.

On the other hand, a second category of criminal offenses are just as likely, if not more so, to be committed abroad; these crimes are not logically dependent on their locality for the government's jurisdiction. Id. at 98-100. For such crimes, Congress' intent to provide for extraterritorial jurisdiction may be "inferred from the nature of the offense" in that, by nature, the crimes have international overtones. Examples of crimes falling into this second category are espionage, counterfeiting, falsification of official documents, perjury before consular officials, and violation of immigration or customs laws. See RESTATEMENT (2d) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (revised), Section A402, p. 240 (1980).

Bowman does not instruct courts to engage in a broadly imaginative enterprise to divine some way in

which the offense at issue can be said to injure the United States government wherever it occurs.[3]

Instead, Bowman specifically instructs courts to remain reluctant to give extraterritorial effect to penal statutes and to do so only when congressional intent to confer extraterritorial jurisdiction clearly and logically follows from the nature of the offense. Bowman, 260 U.S. at 98; see also Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984), cert. denied, 470 U.S. 1031, 105 S.Ct. 1403, 84 L.Ed.2d 790 (1985).

18 U.S.C. Section 3 does not explicitly provide for extraterritorial jurisdiction. To determine whether extraterritorial jurisdiction should be implied for an accessory-after-the-fact, the panel in this case briefly reviewed the plethora of cases finding implied extraterritorial jurisdiction for substantive crimes similar to the crimes with which the principals involved in the murder of Agent Camarena could be charged. It noted that such jurisdiction had been implied for: (a) drug smuggling which "by its very nature involves foreign countries, and...

3 See, e.g., United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945)(Judge Learned Hand)("We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has not consequences within the United States").

the accomplishment of the crime always requires some action in a foreign country", Brulay v. United States, 383 F.2d 345, 350 (9th Cir.), cert. denied, 389 U.S. 986, 88 S.Ct. 469 (1967); (b) killing a member of congress which "is directly injurious to the government, and [is] capable of perpetration without regard to particular locality", Layton, supra, 855 F.2d at 1395; and for assault and attempted murder of DEA agents, which is "exactly the type of crime that Congress must have intended to apply extraterritorially". United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir. 1984), cert. denied, 471 U.S. 1137, 105 S.Ct. 2679, 86 L.Ed.2d 698 (1985).

Finding it clear that extraterritorial jurisdiction could be implied with respect to Caro-Quintero's participation in the kidnapping and murder of a DEA agent, the Ninth Circuit panel then concluded that extraterritorial jurisdiction also could be implied with respect to the offense committed by Felix in assisting Caro-Quintero to avoid apprehension, trial or punishment. Felix-Gutierrez, 940 F.2d at 1205.

The whole history of modern criminal jurisprudence provides the compelling reason for "applying a different rule" to accessories-after-the-fact than to conspirators. For centuries, common law jurisdictions have distinguished between principals and conspirators, who

are considered "parties" to the underlying substantive offense, and accessories after the fact, who have committed the distinct offense of obstruction of justice.

At common law, there were numerous distinct categories of circumstances that rendered a person a participant in a course of criminal conduct: principals in the first or second degree, accessory-before-the-fact, and accessory-after-the-fact. See 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Chapter 3, 34-39. In "ancient times," accessories after the fact were felons, just like principals and accessories before the fact, and thus were punishable by death. G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 410 (2d ed. 1961); 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 231 (1883). For centuries, however, an accessory-after-the-fact has been considered guilty of a separate, lesser offense than principals or accessories-before-the-fact. LAFAVE & SCOTT, CRIMINAL LAW 598 (2d ed. 1986).

The modern trend in criminal law has been to abolish the distinctions between accessories-before-the-fact and principals in the first and second degree, and to consider all of these participants to be principals in the substantive offense. However, the distinction between all principals, on the one hand, and accessories-after-the-fact, on the other, has been retained. Id. The rationale for retaining

the common law category of accessory-after-the-fact is clear:

> Principals in the first degree, principals in the second degree, and accessories before the fact . . . have all played a part in the commission of the crime and are quite appropriately held accountable for its commission. The accessory after the fact, on the other hand, had no part in causing the crime; his offense is instead that of interfering with the processes of justice and is best dealt with in those terms.

Id. at 598-599.

Moreover, under modern conspiracy doctrines, a co-conspirator is treated as a principal in the criminal acts of his fellow conspirators. See, e.g., Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

The differences in penalties meted out to accessories-after-the-fact from penalties meted out to conspirators and principals reflect the fact that the accessory has committed a lesser offense than the principal or co-conspirator. Under 18 U.S.C. Section 3, an accessory-after-the-fact is subject to a maximum punishment of one half the maximum sentence for the substantive offense, but no more than ten years. Almost all other American jurisdictions prescribe minimal penalties without any reference to the penalty attached to

the principal offense. LAFAVE & SCOTT, supra, at 598. The sentences imposed on appellant and his co-defendants similarly reflect the difference in the gravity of their respective offenses. Rene Verdugo-Urquidez and Raul Lopez-Alvarez were both sentenced to 240 years. In stark contrast, appellant Felix was sentenced to ten years, the maximum allowable under the federal statute.

The Ninth Circuit panel's analysis in appellant Felix's case was premised on a completely erroneous understanding of criminal law. The accessory-after-the-fact offense is primarily a crime of obstruction of justice and not the underlying offense. Thus, Bowman mandates that a determination of whether extraterritorial jurisdiction may be implied for accessories-after-the-fact depends upon whether obstruction of American justice is logically the type of crime considered to occur outside the territorial boundaries of the United States. The answer to this question must be negative.

The American justice system is, by definition, a system which operates within the territorial boundaries of the United States. There are no American trial or appellate courts outside the boundaries of the United States. Nor can the presence of certain law enforcement officers in foreign countries, such as DEA agents, be said to extend the American justice system abroad. No plausible

argument exists that an American justice system, with its constitutional rights and privileges, is somehow established in Afghanistan, Thailand or Mexico simply because DEA agents are present in those countries.

A review of the facts in appellant's case underscores the conclusion compelled by Bowman that no extraterritorial jurisdiction may be inferred with respect to accessories after the fact. Felix did not in any way obstruct any American justice process. Felix did not assist Caro-Quintero in fleeing the United States; rather, he assisted Caro-Quintero flee from Mexico to Costa Rica. At the time Caro-Quintero fled to Costa Rica, there was no outstanding United States warrant for his arrest on charges related to the Camarena murder; he was sought by Mexican law enforcement agents on drug charges. Similarly, the United States had not sought to extradite Caro-Quintero from Mexico, nor would such extradition

4 The elementary proposition that the American justice system is confined to the territorial limits of the United States is reflected in numerous decisions of the Supreme Court severely circumscribing the extension of American constitutional guarantees to foreign nationals outside the United States. See, e.g., United States v. Verdugo-Urquidez, 110 S.Ct. 1839, 108 L.Ed.2d (1989) (Fourth Amendment guarantees against unreasonable search and seizure do not apply to Mexican citizens with respect to DEA searches in Mexico).

have been likely. Under Article 9 of the Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. N. 9656, extradition of Mexican Nationals to the United States is not compulsory but is subject to the discretion of the Mexican government.[5]

Ironically, the only impact Felix's actions had on American justice processes was to facilitate the apprehension of Caro-Quintero. Though Caro-Quintero could not easily have been extradited from Mexico to stand trial in the United States for murdering Camarena, extradition was more readily available from Costa Rica because Caro-Quintero is not a citizen of Costa Rica. Thus, Felix's actions actually made it easier for the United States lawfully to bring Caro-Quintero within its territorial boundaries for trial in the American justice system on charges of murdering a DEA agent.

5 Although DEA agents were present at the airport when Caro-Quintero fled to Mexico, they could not lawfully have arrested him for any offense against the United States, including the murder of Camarena. The only way certain way they could have compelled his presence in the United States for trial would have been to kidnap him. Kidnapping, even when perpetrated by American law enforcement agents, would not normally be considered a process of American justice. See generally Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991).

In sum, Felix, a Mexican citizen, acted in Mexico and Costa Rica to assist another Mexican citizen in fleeing the Mexican justice system. Implying extraterritorial jurisdiction by the United States for such conduct is a flagrant disregard of the proper limits of extraterritorial jurisdiction under domestic law.

B. UNDER INTERNATIONAL LAW, EXTRATERRITORIAL JURISDICTION OVER ACCESSORIES-AFTER-THE-FACT IS PATENTLY UNREASONABLE.

Even if congressional intent to extend jurisdiction extraterritorially over a statute falling within Bowman's second category may be implied because of the nature of the offense, Bowman and its progeny have held that jurisdiction must be consistent with established principles of international law. See, e.g., Bowman, 260 U.S. at 97-98; Chua Han Mow, 730 F.2d at 1311. Accepted principles of international law severely limit the extension of jurisdiction to a non-citizen who acts outside the prosecuting country. See, e.g., United States v. Columba- Colella, 604 F.2d 356, 358 (5th Cir. 1979); United States v. Velasquez-Mercado, 697 F.Supp. 292, 293 (S.D.Tex. 1988), aff'd, 872 F.2d 632 (5th Cir. 1989), cert. denied, 110 S.Ct. 187, 107 L.Ed.2d 142 (1989).

The Ninth Circuit panel identifies three international law principles as supporting extraterritorial jurisdiction over appellant's conduct. The territorial principal encompasses jurisdiction over acts occurring within the United states and acts occurring outside its borders which have effects within the national territory of the United States. The protective principle provides extraterritorial jurisdiction when the national interest or national security is threatened or injured by extraterritorial conduct. Finally, the "passive personality" principle allows the assertion of extraterritorial jurisdiction on the basis of the nationality of the victim. Felix-Gutierrez, 940 F.2d at 1205- 1206.

Once again, the panel's conclusion that these principles support extraterritorial jurisdiction over appellant is fatally premised upon its erroneous conflation of the acts of the principal with the acts of the accessory. The panel asserts that the "passive personality" principle is satisfied because the "victim" of Felix's offense was an American DEA agent. As pointed out above, however, Felix was not under any criminal jurisprudence a principal in the murder of Camarena. The only "victim" in the obstruction of justice presented by the offense of accessory-after-the-fact is the justice system obstructed.

The panel next asserts that Felix's actions "created a significant detrimental effect in the United States and adversely affected the national interest". However, no court has yet held that obstruction of the justice process of a foreign country somehow implicates concerns of national security or even national interest.

Finally, the panel asserts that Felix, in "helping to prevent the United States from apprehending Caro-Quintero... directly hindered United States efforts to prosecuted an alleged murderer of a government agent." This assertion is directly contradicted by the facts in appellant's case. At the time of Felix's conduct, there was no outstanding U.S. warrant for Caro-Quintero. Neither DEA agents nor any other American law enforcement agents could lawfully have arrested Caro-Quintero in Mexico. Nor could the United States have easily sought extradition of Caro-Quintero from Mexico, though such extradition to the United States was made more readily available by Felix's actions in helping Caro-Quintero flee from Mexico to Costa Rica.

Indeed, the only way in which Felix may have "hindered" any American law enforcement efforts is by impeding efforts by DEA agents in Mexico to kidnap Caro-Quintero and bring him within U.S. territory. There is no principle of international law which provides for

extraterritorial jurisdiction over conduct impeding efforts by American agents to perpetrate a kidnapping in a foreign country.

The Ninth Circuit panel's decision in petitioner's case amounts to the assertion of extraterritorial jurisdiction over a Mexican national acting in Mexico and Costa Rica to impede Mexican law enforcement agents from arresting a Mexican citizen for crimes in Mexico. Neither this court nor any United States Court of Appeal has construed international law principles concerning extraterritorial jurisdiction so broadly.

CONCLUSION

For the reasons stated above, petitioner Felix's Petition for Writ of Certiorari should be granted.

Dated: March 31, 1993 Respectfully submitted,

RANDOLPH & LEVANAS

Donald C. Randolph

By: DONALD C. RANDOLPH
Attorneys for Appellant
JESUS FELIX-GUTIERREZ

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	No. 89-50028
Plaintiff-Appellee,	)	D.C. No. CR-87-
v.	)	0422-ER-7
JESUS FELIX-GUTIERREZ	)	Order
Defendant-Appellant.	)	Filed Jan. 3, 1992

~~Before: BROWNING, NELSON~~ and REINHARDT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee,

v.

Jesus FELIX-GUTIERREZ, Defendant-Appellant.

No. 89-50028.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted Feb. 4, 1991.

Decided July 22, 1991.

Defendant was convicted in the United States District Court for the Central District of California, Edward Rafeedie, J., of being accessory after the fact, and he appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) district court could exercise extraterritorial jurisdiction over defendant based on acts committed outside United States; (2) evidence was sufficient to support conviction; and (3) defendant was not entitled to severance.

Affirmed.

Donald C. Randolph, Gary S. Wigodsky, Overland, Berke, Wesley, Gits, Randolph & Levanas, Santa Monica, Cal., for defendant-appellant.

Robert L. Brosio, Asst. U.S. Atty., Chief, Crim. Div., Steven E. Zipperstein, Asst. U.S. Atty., Chief, Crim. Appeals, Dorothy Shubin, Asst. U.S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before BROWNING, D. W. NELSON and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Jesus Felix-Gutierrez appeals his conviction for being an accessory after the fact. Felix was charged with assisting Rafaelo Caro-Quintero, who allegedly participated in the kidnapping and murder of DEA Special Agent Enrique Camarena-Salazar and Alfredo Zavala, in his effort to avoid capture by law enforcement authorities.[1] Following a jury trial, Felix was convicted and

1 The indictment charged a violation of 18 U.S.C. s 3, which provides in pertinent part:
Whoever, knowing that an offense against the United States had been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent apprehension, trial or punishment, is an accessory after the fact.

sentenced to 10 years in prison. He raises several issues on appeal. We reject his claims and affirm the judgment of the district court. [2]

I. Facts

This case arises out of the 1985 kidnapping, torture, and murder of DEA Special Agent Enrique Camarena and Alfredo Zavala, a pilot who was a confidential DEA informant. Camarena and Zavala disappeared on February 7, 1985, in Guadalajara, Mexico. Approximately one month later, their bodies were found lying together in an open field near Zamora, Michoacan, Mexico. They had been brutally tortured and murdered.

During trial, the prosecution introduced evidence that Caro-Quintero, an alleged drug kingpin in Mexico, played a central role in the torture and murders of Camarena and Zavala. Felix and his co-defendant, Rene Martin Verdugo-Urquidez, were associated with the Caro-Quintero narcotics enterprise. Felix was responsible for the importation of hundreds of tons of marijuana into

2 Felix and Verdugo were tried jointly in the district court, along with another defendant. Both Felix and Verdugo timely appealed their convictions. On July 31, 1990, we issued an order consolidating their appeals. We dispose of Verdugo's appeal in a separate published opinion issued concurrently herewith.

the United States from Mexico and assisted in the importation of cocaine into Mexico and the United States from Columbia and Costa Rica. He directed the distribution by one individual of between one and five kilos of cocaine on at least thirty occasions.

On February 9, 1985, two days after Agent Camarena's disappearance, Caro- Quintero, following a shoot-out at the airport with Mexican law enforcement officials and DEA agents, travelled from Mexico to Costa Rica in a Falcon jet. Felix travelled to Costa Rica from Panama that same day. He thereafter began to travel under aliases between Panama, Costa Rica, and the United States. While in Costa Rica, he assisted Caro-Quintero in purchasing a red Toyota. He was also seen at Caro-Quintero's La Quinta residence and remarked to an associate that Caro-Quintero could not meet with the associate at the time because they were people with few friends. Felix told Arturo de la Torre, who often transported narcotics for him, that he and Inez Calderon had arranged for a pilot to take Caro-Quintero from Mexico to Costa Rica. Felix also stated that the "heat was on" Caro-Quintero because of the kidnapping of Agent Camarena.

Fearing that Caro-Quintero's flashy style would attract law enforcement authorities, Felix left Costa Rica.

After Caro-Quintero's arrest, Felix returned to Los Angeles. Notwithstanding the fact that he owned a home and two businesses in Los Angeles, he stayed at the Best Western hotel in Monterey Park. On April 9, 1985, de la Torre visited Felix at the hotel. They watched a television newscast which reported Felix's suspected involvement in the flight of Caro-Quintero from Mexico to Costa Rica. The newscast mentioned Felix's alias and his nickname ("Cachas"). Felix told de la Torre that he never thought that Caro-Quintero would "finger him."

De la Torre drove Felix to Reno, where he had a tattoo removed from his right shoulder. The tattoo consisted of the word "Cachas." Felix returned to Los Angeles and had the stitches removed from his shoulder, and had plastic surgery to add a dimple and to remove the sagging beneath his eyes. He was arrested in Whittier, California on December 24, 1986. At the time of his arrest, he had in his possession false identification, and denied that he was "Cachas."

II. Extraterritorial Jurisdiction

Appellant contends that the district court lacked subject matter jurisdiction to try him for criminal acts that occurred entirely outside the United States or its territories. This court reviews de novo the question whether the district court lacked subject matter

jurisdiction. United States v. Layton, 855 F.2d 1388, 1394 (9th Cir.1988), cert. denied, 489 U.S. 1046, 109 S.Ct. 1178, 103 L.Ed.2d 244 (1989).

A. Overview

Generally, there is no constitutional bar to the extraterritorial application of United States penal laws. Chua Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir.1984), cert. denied, 470 U.S. 1031, 105 S.Ct. 1403, 84 L.Ed.2d 790 (1985); United States v. King, 552 F.2d 833, 850 (9th Cir.1976), cert. denied, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977). Courts look to congressional intent, express or implied, to determine whether a given statute should have extraterritorial application. United States v. Bowman, 260 U.S. 94, 98, 43 S.Ct. 39, 41, 67 L.Ed. 149 (1922); Chua Han Mow, 730 F.2d at 1311. Moreover, courts generally look to international law principles to ensure that an extraterritorial application of United States laws is "reasonable." Id.

B. Congressional Intent

Felix was charged as an accessory after the fact for assisting Caro- Quintero in eluding law enforcement agents following Caro-Quintero's participation in the kidnapping and murder of a DEA agent. The statute under which Felix was charged does not expressly provide for

extraterritorial application. However, we will infer congressional intent to provide for extraterritorial jurisdiction for crimes that are not dependent on the locality in which they were committed "but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated ..." Bowman, 260 U.S. at 98, 43 S.Ct. at 41. For such crimes, limiting jurisdiction to the territorial bounds of the United States would greatly curtail the scope and usefulness of the penal statutes. Id. Thus, " '[t]he exercise of [extraterritorial power] may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved.' " United States v. Thomas 893 F.2d 1066, 1068 (9th Cir.1990) (quoting United States v. Baker, 609 F.2d 134, 136 (5th Cir.1980)).

18 U.S.C. s 3 provides that a person is an accessory after the fact if he receives, relieves, comforts or assists someone he knows has committed an offense against the United States. Conduct outside the territorial bounds of the United States can be an offense against the United States only if a United States law reaches that conduct. Here, we must examine two questions: (1) whether the underlying crime, Caro-Quintero's participation in the kidnapping and murder of a DEA agent, is subject to extraterritorial application; and (2) whether assisting

someone who has committed the underlying crime in avoiding apprehension, trial, or punishment is subject to such treatment.

We noted in Brulay v. United States, 383 F.2d 345, 350 (9th Cir.), cert. denied, 389 U.S. 986, 88 S.Ct. 469, 19 L.Ed.2d 478 (1967), that drug "smuggling by its very nature involves foreign countries, and ... the accomplishment of the crime always requires some action in a foreign country...." It follows that United States agents involved in the investigations of international organizations seeking to smuggle drugs into the United States will, when foreign governments are willing to cooperate, conduct a portion of their activities outside the territorial bounds of the United States. We have no doubt that whether the kidnapping and murder of such federal agents constitutes an offense against the United States is not dependent upon the locus of the act. We think it clear that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially. See Layton, 855 F.2d at 1395 (citation omitted) ("the killing of a member of Congress--is 'directly injurious to the government, and [is] capable of perpetration without regard to particular locality' "); United States v. Benitez, 741 F.2d 1312, 1317 (11th Cir.1984) (concluding that "assault and attempted murder of DEA agents is exactly

the type of crime that Congress must have intended to apply extraterritorially"). Therefore, the remaining question is whether the offense committed by Felix, in assisting Caro-Quintero to avoid apprehension, trial, or punishment, is subject to extraterritorial application.

We conclude that the crime of "accessory after the fact" gives rise to extraterritorial jurisdiction to the same extent as the underlying offense. That is, if the underlying substantive statute applies extraterritorially, the statute making it unlawful to assist another in avoiding apprehension, trial or punishment also applies extraterritorially when invoked in connection with an extraterritorial violation of the underlying statute. Under such circumstances, neither the locality of the underlying offense nor of the related accessory after the fact offense is determinative of whether an offense has been committed against the United States; both extraterritorial offenses injure the government. Limiting jurisdiction to the territorial bounds of the United States would greatly curtail the scope and usefulness of the accessory after the fact statute in cases in which extraterritorial crimes occur. We have inferred extraterritorial application of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses. See, e.g., Chua Han Mow, 730 F.2d at 1311; United States v.

Cotten, 471 F.2d 744, 750 (9th Cir.), cert. denied, 411 U.S. 936, 93 S.Ct. 1913, 36 L.Ed.2d 396 (1973); Brulay, 383 F.2d at 350. We see no reason why a different rule should apply in accessory after the fact cases. [3]

C. International Law Jurisdictional Limitations

Prior to giving extraterritorial effect to any penal statute, we must consider whether extraterritorial

3 Our decision is entirely consistent with EEOC v. Arabian American Oil Co., — U.S. ---, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). In that case, the Supreme Court reiterated the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " Id. 111 S.Ct. at 1230 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949)). This longstanding principle was also recognized in Bowman, where the Court stated that if a statute's prohibitions are "to be extended to [apply to acts] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard." 260 U.S. 94, 98, 43 S.Ct. 39, 41, 67 L.Ed. 149 (1922). However, Bowman went on to state an exception to the presumption against extraterritoriality. As we have noted, the Court held that "the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated...." Id. Arabian American did not purport to overrule this exception, nor did it even mention Bowman. Accordingly, we must assume that the Bowman exception--which we have applied here--remains the law.

application would violate international law. Thomas, 893 F.2d at 1069; Chua Han Mow, 730 F.2d at 1311. The law of nations permits the exercise of criminal jurisdiction by a nation under five general principles: territorial, national, protective, universality, and passive personality. Chua Han Mow, 730 F.2d at 1312.[4] As one commentator stated, "[R]ules of extraterritorial jurisdiction historically have been governed by the twin principles of sovereignty over national territory and sovereignty over national citizens, with a view to what alternatively has been called 'comity,' 'fairness,' 'justice,' 'reasonableness,' or, more directly, 'the balancing of national interests.' " Note, Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms, 103 Harv.L.Rev. 1273, 1280 (1990) (footnote omitted).

Here, three of the international law principles permitting extraterritorial jurisdiction have application: (i) territorial, (ii) protective, and (iii) passive personality. Under the first two of these, jurisdiction is based on the nature of the conduct or offense. Courts have defined the

4 For a discussion on the historical development of extraterritorial jurisdiction, see Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957).

"territorial" principle to include not only acts occurring within the United States, but acts occurring outside the United States' borders that have effects within the national territory. See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir.1945) (stating that "[i]t is settled law ... that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"). Under the "protective" principle, jurisdiction is based on whether the national interest or national security is threatened or injured by the conduct in question. Under the "passive personality" principle, courts may assert extraterritorial jurisdiction on the basis of the nationality of the victim.

Felix's actions created a significant detrimental effect in the United States and adversely affected the national interest. In helping to prevent the United States from apprehending Caro-Quintero, Felix directly hindered United States efforts to prosecute an alleged murderer of a government agent. Furthermore, that agent was a United States citizen. We need not decide whether any one of these facts or principles, standing alone, would be sufficient. Rather, we hold that cumulatively applied they require the conclusion that giving extraterritorial effect to

the accessory after the fact statute in Felix's case does not violate international law principles.

D. Conclusion

In conclusion, we hold that one who helps another who has kidnapped and murdered a DEA agent in a foreign nation to avoid apprehension, trial, or prosecution for such crimes may be prosecuted for that offense in a court of the United States, even though all of his criminal conduct occurred beyond the territorial limits of this country.

III. Sufficiency of the Evidence

Appellant argues that the evidence introduced at trial was insufficient to sustain his accessory after the fact conviction. Viewing the evidence in the light most favorable to the prosecution, we must decide whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), reh'g denied, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979) (emphasis in original).

18 U.S.C. s 3 provides in pertinent part that "[w]hoever, knowing that an offense against the United States had been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his

apprehension, trial or punishment, is an accessory after the fact." Both the government and Felix agree that in order to sustain a conviction on this count, the government must prove beyond a reasonable doubt that: (i) Caro-Quintero participated in the kidnappings and murders of Camarena and Zavala; (ii) Felix had knowledge of Caro-Quintero's participation; and (iii) Felix assisted Caro- Quintero in avoiding apprehension, trial or punishment.[5] See United States v. Rux, 412 F.2d 331, 333 (9th Cir.1969). Knowledge may be shown entirely through circumstantial evidence. United States v. Burnette, 698 F.2d 1038, 1051 (9th Cir.), cert. denied, 461 U.S. 936, 103 S.Ct. 2106, 77 L.Ed.2d 312 (1983). The direct and circumstantial evidence proffered by the prosecution was sufficient to sustain Felix's conviction.

In addition to the extensive forensic evidence placing Camarena and Zavala at Caro-Quintero's residence, the prosecution introduced evidence that Caro-Quintero assisted in the interrogation of the two agents. There was also direct and circumstantial evidence that Felix not only knew of Caro-Quintero's participation in the murders and

5 Felix contends that the government must also prove an additional circumstance. We discuss this alleged requirement infra, at 1206-07.

kidnappings, but assisted him despite this knowledge. According to Arturo de la Torre's testimony, Felix informed him that he, along with Inez Calderon, had hired a pilot to take Caro-Quintero from Mexico to Costa Rica because the "heat was on" Caro-Quintero as a result of the Camarena kidnapping. Felix also told Jay de la Torre, a relative of Arturo's, that [they] "had to get rid of [Camarena]." He travelled to Costa Rica on the same day Caro-Quintero fled Guadalajara to Costa Rica. The prosecution's evidence showed that Felix had a high position within Caro- Quintero's narcotics enterprise. After the news broadcast in which Felix was identified as a suspect in arranging Caro-Quintero's flight, Felix stated that he never thought Caro-Quintero would report him to the authorities. This evidence cumulatively is clearly sufficient to support Felix's conviction as an accessory after the fact to Caro-Quintero.

Appellant also argues that his conviction cannot stand because the government introduced no evidence that he intended to help Caro-Quintero avoid apprehension, trial or punishment for crimes against the United States. This argument lacks merit. As we noted in United States v. Hobson, 519 F.2d 765, 769 (9th Cir.), cert. denied sub nom. Hobson v. United States and Newman v. United States, 423 U.S. 931, 96 S.Ct. 293, 46

L.Ed. 261 (1975), it is irrelevant whether someone assisting another in avoiding apprehension, trial or punishment knows the "jurisdictional nature of his pursuers." Id. More important, here the jury could have reasonably inferred that Felix knew that the United States sought to apprehend Caro-Quintero, as Camarena was a United States citizen working for the DEA, and Zavala was a confidential informant for the DEA.

Viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to sustain Felix's conviction as an accessory after the fact to Caro-Quintero.

IV. Evidentiary Rulings

Felix claims that the district court committed reversible error in admitting "prejudicial" and "irrelevant" evidence. We reject each of his claims. He first contends that the district court, in violation of Rules 404(b) and 403 of the Federal Rules of Evidence, erroneously allowed the government to introduce evidence regarding his drug trafficking activities in 1981 and 1982. Rule 404(b) prohibits the prosecution from introducing evidence of a defendant's prior crimes to show that the defendant has in general a bad character and that therefore he is more likely to have committed the crime with which he is charged. United States v. McKoy, 771 F.2d 1207, 1213

(9th Cir.1985).[6] Under Rule 404(b), evidence of other crimes or acts may be admitted where relevant to establish motive. The prosecution's evidence of Felix's narcotics trafficking activity was offered to prove the existence and structure of the narcotics enterprise and to show Felix's membership and position in that enterprise; these facts tended to establish Felix's motive for acting as an accessory after the fact. The prejudicial effect of this evidence does not outweigh its probative value, and therefore it was admissible under Rule 403. Thus, the district court did not abuse its discretion in admitting the evidence of Felix's 1981 and 1982 drug trafficking activities.

Appellant also asserts that the admission of evidence regarding his flight was prejudicial error. "Evidence of flight is generally admissible as evidence of consciousness of guilt and of guilt itself." United States v. Harris, 792 F.2d 866, 869 (9th Cir.1986) (citations omitted). Since "flight" is essentially an admission by

6 Fed.R.Evid. 404(b) provides:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

conduct, its probative value as circumstantial evidence depends upon the degree of confidence with which four inferences can be drawn:

(1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

United States v. Myers, 550 F.2d 1036, 1049 (5th Cir.1977); see also United States v. Silverman, 861 F.2d 571, 581 (9th Cir.1988). Felix's behavior in fleeing from Costa Rica, hiding in Los Angeles, having his distinctive tattoo removed in Reno, submitting to cosmetic facial surgery, and using assumed names strongly supports the inference that his conduct constituted flight. Moreover, the timing of Felix's actions reasonably leads to the second, third, and fourth inferences. The evidence of flight was not more prejudicial than probative. Accordingly, we conclude that the district court did not abuse its discretion in allowing the introduction of that evidence.

Finally, Felix argues that the admission of evidence regarding his connections to Costa Rica was prejudicial error. As such evidence tends to prove Felix's ability to establish a safe haven for Caro-Quintero in Costa Rica, and the probative value of such evidence is not

outweighed by its prejudicial effect, the district court did not err in allowing the introduction of the evidence of Felix's connections to Costa Rica.

V. Severance Motion

Felix contends that the trial court abused its discretion in denying his motions for severance. The government contends that Felix has waived his right to assert that the district court erred in denying his motion, because he failed to renew it at the close of all evidence. As a general rule, a defendant waives his severance motion by not renewing it at the close of evidence. United States v. Smith, 893 F.2d 1573, 1581 (9th Cir.1990). However, we have noted that "[t]his requirement is not an inflexible one; waiver may be absent when the motion accompanies the introduction of evidence deemed prejudicial and a renewal at the close of all evidence would constitute an unnecessary formality." United States v. Kaplan, 554 F.2d 958, 965 (9th Cir.) (per curiam), cert. denied, 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315 (1977). The guiding principle is whether the defendant diligently pursued the motion. Id. at 966. Felix asserts that he made several requests for severance based on Rules 8(b) and 14. Felix filed a motion for severance from his co-defendants on April 15, 1988. He later filed an opposition, reply, and supplemental opposition. After the district court

denied the motion, Felix filed a motion for reconsideration. Moreover, his severance motion was orally renewed, and denied, several times during trial. Appellant's conduct was sufficient to establish that he "diligently pursued" the motion. Accordingly, we conclude that Felix did not waive his right to challenge the district court's denial of his severance motion.

A. Rule 8(b): Misjoinder

Felix first argues that he was improperly joined with co-defendant Rene Martin Verdugo-Urquidez and with another co-defendant Raul Lopez-Alvarez, who has filed a separate appeal, because the three of them did not participate in the same series of acts or transactions. Rule 8(b) of the Federal Rules of Criminal Procedure governs the joinder of charges against multiple defendants. Rule 8(b) provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same acts or transactions or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

In United States v. Ford, 632 F.2d 1354, 1371-72 (9th Cir.1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1399, 67

L.Ed.2d 369 (1981), we stated that the term "transactions," has a flexible meaning and that the existence of a "series" depends on whether there is a "logical relationship" between the transactions greater than mere factual similarity of events. Id. at 1371-72 (citing United States v. Satterfield, 548 F.2d 1341 (9th Cir.1977), cert. denied, 439 U.S. 840, 99 S.Ct. 128, 58 L.Ed.2d 138 (1978)). The logical relationship between a series of transactions may be shown by the existence of a common plan, scheme, or conspiracy.

All of the charges in this case were overlapping and logically interrelated. The indictment alleged that Verdugo, Lopez, and Felix were members of an international narcotics enterprise and that as part of that enterprise, Verdugo and Lopez allegedly participated in the kidnapping and murder of Camarena, along with Caro-Quintero. Further, the indictment alleged that Felix, as part of the enterprise, helped Caro-Quintero flee to Costa Rica, knowing that Caro-Quintero and other members of the enterprise had participated in the kidnapping and murder of Camarena and Zavala. Evidence of Felix's participation in the narcotics enterprise was necessary to prove the elements of accessory after the fact. The charges against Verdugo, Lopez, and Felix occurred during a brief time span,

involved many of the same participants, and were connected in many areas by overlapping proof. Therefore, the district court properly denied Felix's Rule 8(b) motion. See United States v. Hoelker, 765 F.2d 1422, 1425-26 (9th Cir.1985).

B. Rule 14: Prejudicial Joinder

Felix asserts that he was entitled to a separate trial from Verdugo and Lopez because the joint trial was unduly prejudicial to him. We review the denial of a motion for a severance under Rule 14 due to prejudicial joinder for abuse of discretion. Smith, 893 F.2d at 1581. The district court has wide discretion in ruling on a severance motion. The party seeking reversal of a decision denying severance has the burden of proving "clear," "manifest," or "undue" prejudice from the joint trial, that violates one of his substantive rights, so that the prejudice is of "such magnitude that the defendant was denied a fair trial." United States v. Connors, 825 F.2d 1384, 1391 (9th Cir.1987).

Relying primarily on United States v. Sampol, 636 F.2d 621 (D.C.Cir.1980), Felix argues that the district court abused its discretion in denying his request for severance, because of: (1) confusion of the charges and evidence; (2) grossly disparate charges; and (3) denial of cross- examination and presentation of exculpatory

evidence. Sampol acknowledged the cumulative weight of the three grounds in reaching its decision. We need not decide whether we would follow Sampol in this circuit, or even whether in a particular case an especially strong showing on one of the three elements would be sufficient, because in the case before us Felix cannot prevail under any reasonable construction of the Sampol standard.

1. Confusion of Charges and Evidence

A defendant in a joint trial has a recognized right to a "severance of defendants or ... whatever other relief justice requires" if it appears that he is "prejudiced by a joinder of offenses or of defendants in an indictment ... or such joinder for trial together...." Fed.R.Crim.P. 14. As in the case of the defendant in Sampol, who was charged with misprision of a felony, Felix was accused of a lesser (and less brutal) crime than his co-defendants. However, the circumstances in the Sampol trial differ markedly from those here with respect to the possible confusion of the charges against the various defendants. In Sampol, there was actual testimony at trial that created the erroneous impression that Ignacio Sampol, who was charged with misprision and false statements, was involved in the underlying offenses; that testimony failed to separate Sampol's conduct from that of the defendants who were charged with the conspiracy and murders. Moreover,

Sampol was tried along with his brother, Guillermo Sampol, who the indictment alleged had participated in the underlying conspiracy and murders in addition to two false statement counts. Sampol observed that "on one occasion the confusion was so great that one of the witnesses at the trial, describing a meeting in Venezuela, named Guillermo, but pointed to Ignacio." Id. at 647. Here, the record does not show such confusion and does not give rise to the clear inference that Felix participated in the kidnapping and murders. None of the defendants here was related and no one testified erroneously that Felix actually participated in the underlying crimes. We therefore conclude that there was no comparable confusion of the charges or evidence in this case.

2. Joint Trial On Grossly Disparate Charges

In addition to the question whether the jury was confused by the charges and evidence against the defendants, Sampol examined whether the defendant charged with the "lesser" offenses was prejudiced by his joint trial with defendants accused of grossly disparate crimes. In doing so, Sampol said, "[I]t is fair to inquire 'whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in the light of its volume and the limited admissibility.' " Id. at 647 (quoting United States v. Gaines,

563 F.2d 1352, 1355 (9th Cir.1977)). The record shows that the disparity in the charges did not result in clear, manifest, or undue prejudice to Felix. The disparity in the charges between Felix and his co- defendants has less significance than that in Sampol. because in Felix's case there was far less danger that the jury could have thought that the evidence that related solely to the other defendants was applicable to him. The record also demonstrates that in its deliberations the jury could more readily have "compartmentalized" the evidence as it related to the separate defendants. Moreover, nothing in the record suggests that the disparity in the charges actually hampered the jury's ability to do so. Although there is always some risk of prejudice in cases of this nature, here we cannot say that any prejudice that may have occurred was of the "magnitude" required by Connors. See Connors, 825 F.2d at 1391.

3. Denial of Cross-Examination and Presentation of Exculpatory Evidence.

Felix claims that the admission of Verdugo's and Lopez's statements, which were inadmissible as to Felix, caused him undue prejudice. We disagree. In Sampol, the D.C. Circuit found that the defendant suffered prejudice from the denial of cross-examination and the right to present exculpatory evidence. Id. at 648-51. Again, the

court relied on the confusion in the testimony and the fact that witnesses implicated Sampol in the substantive offense. Here, no comparable testimony was adduced. Nor was Felix denied the right to cross- examine or present exculpatory evidence. None of the admissions to which Felix refers expressly implicates him. Therefore, he could not have suffered any prejudice by those admissions. Felix also asserts that, since the declarants did not testify at trial, he was denied his Sixth Amendment right to confront and cross-examine witnesses. Again, we do not find Felix's argument persuasive, since the declarants in no way implicated him.

4. Summary

Because we find that there was not any confusion in the charges or the testimony, that under the circumstances of this case the disparity in the charges was not unduly prejudicial, and that Felix was not denied the right of cross-examination or the right to present evidence, we conclude that the district court did not abuse its discretion in denying his severance motion under Rule 14.

VI. Jury Instructions

Felix claims that the district court erred in failing to instruct the jury as to the essential elements and the

meaning of "accessory after the fact," and as to the theory of the defense.

Felix's argument that the district court failed to instruct the jury as to the relevant law of accessory after the fact lacks merit. As discussed above, Felix's contention that the prosecution had to prove that he intended to assist Caro-Quintero in avoiding United States law enforcement, as opposed to Mexican law enforcement, is incorrect. See United States v. Hobson, 519 F.2d at 769-70. We also reject Felix's argument that the district court erred in failing to instruct the jury not to consider his prior relationship with Caro-Quintero, as such evidence was clearly admissible and the record shows that the district court properly instructed the jury on its relevance.

With respect to appellant's assertion that the district court failed to instruct the jury as to the defense's theory, "[a] trial court must instruct the jury on the defendant's theory of the case only if the evidence sufficiently supports the theory and the theory is supported by the law." United States v. Sommerstedt, 752 F.2d 1494, 1496 (9th Cir.); amended, 760 F.2d 999 (9th Cir.), cert. denied, 474 U.S. 851, 106 S.Ct. 149, 88 L.Ed.2d 123 (1985). Unlike proper theory of the defense instructions, which set forth the defendant's theory of the case on a fairly abstract level,

Felix's requested "theory of the defense" instructions were essentially arguments regarding the credibility of two witnesses, Arturo and Jay de la Torre. Such credibility determinations should not be made for the factfinder by jury instructions. As we noted in United States v. Hall, 552 F.2d 273 (9th Cir.1977), "[T]he court is not required to accept a proposed instruction which is manifestly intended to influence the jury towards accepting the evidence of the defendant as against that of the prosecution." Id. at 275 (citation omitted). Moreover, the district court gave extensive and accurate instructions regarding the credibility of witnesses. Thus, the district properly rejected Felix's proposed "theory of the defense" jury instructions.

The judgment of the district court is

AFFIRMED.

APPENDIX C

18 U.S.C. SECTION 3

Section 3 of Title 18 of the United States Code provides in full:

Whoever, knowing that an offense against the United States, had been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishmnet, is an accessory after the fact.

Except as otherwise provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory after the fact shall be imprisoned not more than fifteen years.